IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

Supreme Court, U.S.
FILED
AUG 1
MICHAEL RODAK, JR.,

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually, and on behalf of their minor children and on behalf of all others similarly situated,

Petitioners,

against

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE RESPONDENTS

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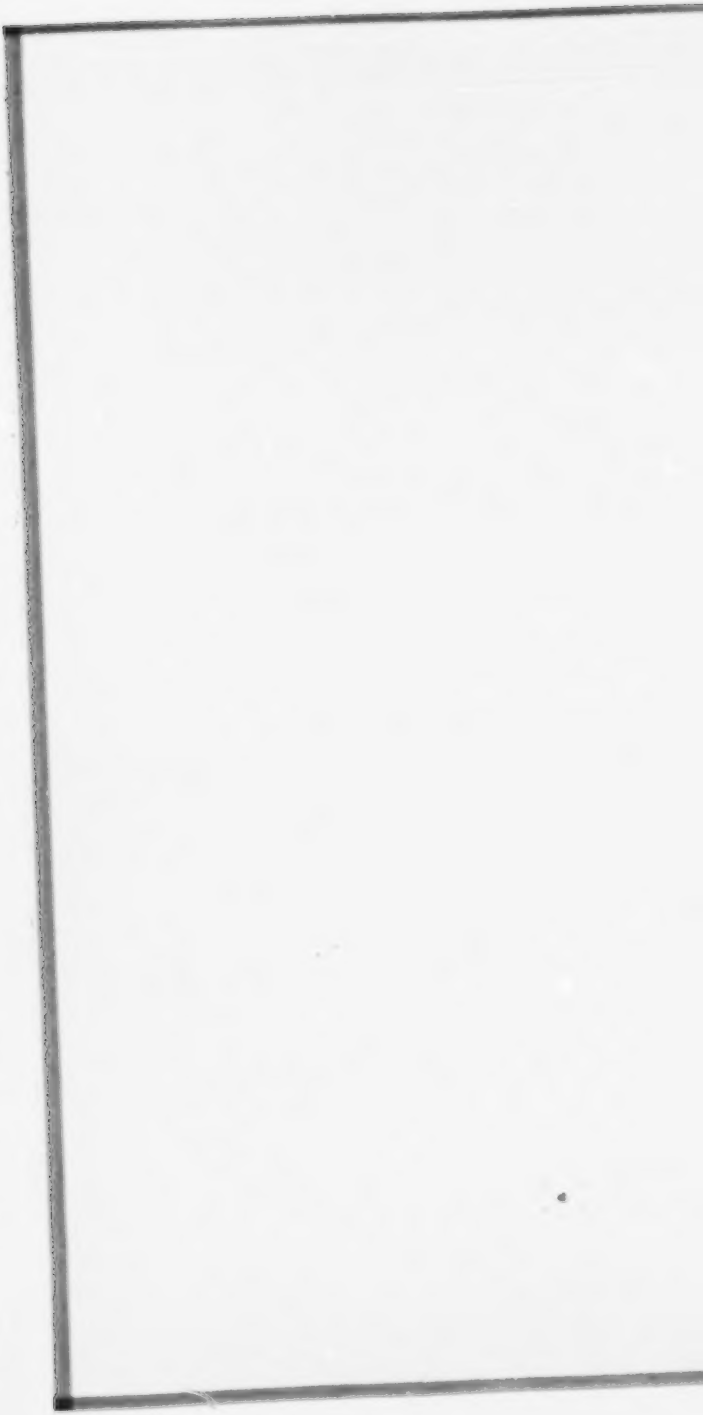


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BRIEF FOR STATE RESPONDENTS

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 449 F. 2d 871. The opinion of the United States District Court for the Eastern District of New York is reported at 319 F. Supp. 271.

Jurisdiction

The judgment of the Court of Appeals was entered on August 13, 1971. The petition for a writ of certiorari was

filed November 6, 1971 and was granted February 22, 1972. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

Questions Presented

1. Should the complaint stand dismissed by reason of petitioners' failure to present a substantial constitutional question with respect to the provisions of New York Education Law §§ 701 and 703, relating to the purchase and use of textbooks in its schools?

2. In any event, is any actual case or controversy presented in view of the recent action of the qualified voters of the respondent School District in voting, for the school year 1972-1973, a tax allocating funds for the purchase and free distribution of textbooks to all children enrolled in grades one through six of the District's schools?

Statutes Involved

New York Education Law, § 701:

> "1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.
>
> 2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
>
> 3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon

individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six—sixty-seven, the school year nineteen hundred sixty-seven—sixty-eight or the school year nineteen hundred sixty-eight—sixty-nine be required to purchase or otherwise acquire text-books, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the text-books owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts:

a. on account of expenditures made during the school year nineteen hundred sixty-six—sixty-seven, the school year nineteen hundred sixty-seven—sixty-eight or the school year nineteen hundred sixty-eight—sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per

pupil in the school year nineteen hundred sixty-six—sixty-seven, the school year nineteen hundred sixty-seven—sixty-eight or the school year nineteen hundred sixty-eight—sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose."

New York Education Law, § 703:

"1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all text-books used, or to be used, by pupils enrolled in grades one to six, inclusive, in the schools of the district.

2. If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. [Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed, neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the schools in such district].* Such board of education or trustees

*Matter in brackets [ ] was approved and became effective June 22, 1971, Laws of 1971, ch. 699.

shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary."

Statement of the Case

This action was commenced in the United States District Court for the Eastern District of New York on September 16, 1970. Petitioners allege in their complaint: (1) that New York Education Law § 701 creates an arbitrary and discriminatory classification as between children in grades one through six and those in grades seven through twelve; (2) that §§ 701 and 703 require a majority vote approval of a tax to enable children in grades one through six to receive free text books, thereby constituting a denial of equal protection; and (3) that pursuant to §§ 701 and 703, textbooks can be obtained in grades one through six only upon payment of a rental fee ($7.50 per pupil), which petitioners cannot pay because of indigency, resulting in deprivation to their children of equal educational opportunity. By order dated October 28, 1970, the District Court (TRAVIA, J.) denied petitioners' application for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 and dismissed their complaint. The order also denied petitioners' motion for a preliminary and permanent injunction and for a declaratory judgment declaring such sections unconstitutional.

On appeal, the United States Court of Appeals for the Second Circuit affirmed (2-1) the order of the District Court by decision dated August 13, 1971, the majority holding that no substantial constitutional question requiring the convening of a three-judge court had been presented for review.

Prior to 1965, the New York legislative scheme for distributing textbooks provided that they were to be dis-

tributed free to children in *all* grades of public schools *only* when authorized by the voters of the district [Laws 1947, c. 820].

In 1965, the New York State Legislature amended § 701 of the Education Law [Laws 1965, c. 320] to require local public school authorities to purchase and loan textbooks free of charge to all pupils in grades 7-12 in public and private schools. Section 703 was also amended [*ibid.*] to authorize the qualified voters of any local school district, by a majority, to vote a tax for the purchase by the school board of all textbooks for—and without any charge to—pupils in grades one through six.

Following rejection by the voters of respondent Union Free School District No. 27, Town of Hempstead, of the 1970-71 and 1971-72 school budgets, children enrolled in grades one to six in that District were charged a fee for the use of textbooks.*

Because of financial considerations, petitioners did not pay the requisite fee for obtaining textbooks. However, at the commencement of this action, counsel for the respondent Board of Education informed the Court and counsel for all parties that surplus textbooks were available in stock from preceding years, and that these books were being furnished free to petitioners' minor children. The Board did not initially distrubute these available textbooks free of charge to petitioners, due to a belief that § 703(2) did not empower them to do so. Clarification was, in any event, provided by the action of the Legislature in supplying the following addendum, effective June 22, 1971, to New York Education Law § 703(2):

"Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed,

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*On May 23, 1972, the District voters in accordance with § 703(2) approved a tax for the 1972-73 budget to cover the purchase and free distribution of all textbooks to all the children in grades one to six.

neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the school in such district."

According to information received from the Counsel and Deputy Commissioner for Legal Affairs for New York State's Department of Education, under this addendum, "if a school district has sufficient books on hand in a given school year so that no additional purchases need be made the books must be loaned free of charge for that year." (Appendix "A" p. 21)

POINT I

Petitioners do not raise a substantial federal constitutional question. Accordingly, the courts below properly dismissed the complaint.

A.

Long before this Court's pronouncement in *Brown* v. *Board of Education,* 347 U.S. 483, that "education is perhaps the most important function of state and local governments", *id.* at 493, New York, in recognition of this principle, provided in its Constitution that:

> "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. State Const., Art. 11, Section 1.

New York State, however, as other governmental units, be they federal, state or municipal, has been faced with continued mounting costs in fulfillment of its obligations to its citizenry including expenditures for education. In order to alleviate this grave financial crisis in the field of educa-

tion, the State Legislature has allocated the financing of textbooks between the state and local districts. The State has assumed full responsibility for furnishing free textbooks to all pupils in grades seven through twelve (N.Y. Education Law § 701[3]) and has empowered local school districts through their qualified voters to provide free textbooks in grades one through six by majority vote (*id.*, § 703).

Clearly, all three judges in the Court below were in consensus to the extent of holding that the first two causes of action were plainly insubstantial (69a-70; 74, note 1).* Apparently, petitioners have abandoned their claims under those causes of action before this Court despite the fact that they focused almost exclusively upon them in both of the courts below (in this connection, see also p. 14 of the *amicus* brief submitted by the Harvard University Center and the United Ministries).

Reversing the strategy they relied on below (*cf.* op. below at 878-879), petitioners now concentrate solely upon the claim (third cause of action) that § 703 violates their constitutional rights because it invidiously discriminates against them on account of their asserted indigency. This claim must necessarily fail both procedurally and substantively.

B.

From the procedural point of view, as noted by the Court below, if petitioners' claim is that a free education requires free textbooks, it is clear that in the present case it is not the state statute that is offensive, but rather the action of the school district voters in failing to vote taxes for textbooks. On this theory, the attack launched is one on a local action, and therefore not properly to be considered by a three-judge court.

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*Numerals followed by "a" refer to pages in petitioners' appendix.

If petitioners' contention is that the State should rearrange its scheme for the financing of education to obviate the necessity for voter approval of taxes for textbooks, the contention would be at odds with this Court's opinion in *James* v. *Valtierra,* 402 U.S. 137.

In the instant case, approval is for the sole purpose of raising revenues to purchase textbooks to be used by pupils enrolled in grades one through six in the District, and it cannot seriously be argued that it is in fact aimed at what petitioners conceive to be an "insular minority." Rather, as this Court stated in *Valtierra:*

> "The procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.' " *id.* at 143.

C.

New York Education Law §§ 701(3) and 703 involve a clearly valid exercise of legislative powers.

Section 701(3) was amended in 1965 to require local public school boards to lend textbooks free of charge to all students in grades seven through twelve.

Prior to 1965, these school boards had authority to purchase and to rent or sell textbooks and other supplies to all children attending school, but a majority of qualified voters might vote a tax to provide funds to purchase and furnish free such textbooks. See *Board of Education etc.* v. *Allen,* 392 U.S. 236. The importance of such vote is reflected in *Kramer* v. *Union Free School District,* 395 U.S. 621, 623 (1969). By the 1965 amendment discussed in *Allen,* the State undertook to defray the expense of the furnishing of free textbooks by the local school districts. This provides State aid, in addition to the annual apportionment to each school district, in an amount equal to the cost of textbooks purchased and loaned by the district

to public and private school children up to a limit of $10 per pupil in grades 7-12. The State Department of Education estimated that the cost of such textbooks had been $5.50 per pupil, but noted that "there is nothing in the bill to restrain local school districts from spending up to $10 every year for every child, 7-12" (McKinney's 1965 Session Laws of New York, p. 2056).

New York, with its finite limited resources, set forth the reasons for mandatory textbooks only for children in the upper grades in the Statement of Purpose which accompanied the 1965 amendment of § 701 by the Legislature:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. . . . It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state" [Laws of 1965, Ch. 320, § 2].

In accordance with this policy declaration, explicitly aimed at correcting imbalance in our educational system leading to insufficient numbers of students proficient in the fields of science, mathematics, etc., the New York Legislature has sought to alleviate that condition by concentrating upon the junior high school and high school levels where these subjects are primarily taught, and where the number and expense of textbooks required for the purpose would impose a heavier financial burden upon the students

enrolled in those grades. Thus the legitimate concern of the Legislature in dealing initially with the monetary problem facing the older, more advanced students is clearly understandable, and plaintiffs' attack does not approach "the kind of caprice which could generate serious doubts under the equal protection clause." *Snell* v. *Wyman*, 281 F. Supp. 853, 866 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969).

It should be noted, moreover, that the use of textbooks free of charge by grade 1-6 pupils in New York is far more extensive than petitioners' contentions would imply—especially in large urban areas where, as is well known, the overwhelming percentage of welfare families reside. Large numbers of poor children throughout New York State are simply not attending school in the lower grades without free textbooks. Thus, in city school districts, the boards of education are authorized to provide—independent of the voters—free textbooks and other supplies to schoolchildren in all grades. See N.Y. Education Law Art. 51, § 2503, subd. 7 (applicable to cities with less than 125,000 population; § 2501) and Art. 52, § 2554, subd. 7 (applicable to the Cities of New York, Buffalo, Rochester, Syracuse and Yonkers; § 2550 [Albany, with its decrease of population to below 125,000 now falls under Art. 51, pursuant to L. 1972, c. 65]).

This Court in *McDonald* v. *Board of Elections*, 394 U.S. 802, stated in no uncertain terms that:

> "Though the wide leeway allowed the State by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently and the presumption of statutory validity that adheres thereto admit of no settled formula, some basic guidelines have been firmly fixed. The distinction drawn by a challenged statute must bear some relationship to a legitimate state end and will be set aside as violative of

the Equal Protection Clause only if based on reasons totally irrelevant to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only 'if no grounds can be conceived to justify them [citations omitted].' With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every end that might conceivably have been attacked. . . ."

Petitioners' reliance upon *Shelton* v. *Tucker*, 364 U.S. 479, 488, for the proposition that the legislative purpose could be pursued by less drastic means is without merit in the context of the instant subject of this litigation. (But see opinion of the District Court [54a-55a] outlining the various alternatives facing the Legislature.) Clearly, the "less drastic means" doctrine is applied in cases of "constitutionally protected interests" (*Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed. 2d 274) (*e.g.*, voting and interstate travel) and not those dealing with social welfare as in the case at bar. "The very complexity of the problems suggest that there will be more than one constitutionally permissible method of solving them." *Jefferson* v. *Hackney*, 32 L. ed. 2d 285, 296.

D.

Petitioners' reliance upon the claim that education is a fundamental right, and that the statute impinges upon petitioners' access to that right, distorts the dimensions of the actual litigation presented here.

We recognize, as this Court noted in *Shapiro* v. *Thompson,* 394 U.S. 618, that a State in order to preserve its financial integrity "may not accomplish such purpose by invidious distinctions between classes of citizens [so as to] reduce expenditures for education by *barring* indigent children from its schools." *Id.* at 733 (emphasis supplied). We are not barring anyone, for any reason, from access to our schools. This fact totally exposes petitioners' untoward reliance upon *Griffin* v. *Illinois,* 351 U.S. 12; *Douglas* v. *California,* 372 U.S. 353; and *Boddie* v. *Connecticut,* 401 U.S. 371, for all these cases deal with the State's shutting off of *access* to the courts.

In *Douglas,* this Court found that ". . . where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357 (emphasis in text).

In *McGinnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd. per curiam* 394 U.S. 322, the plaintiffs analogized (in an education case) as petitioners do here, to *Griffin* and *Douglas.* The Court rejected the analogy noting that the decided cases established significant but limited principles. "The holding in *Douglas* derived primarily from its criminal justice setting rather than the poverty of the defendant." *McGinnis* v. *Shapiro, supra,* at 334. And indeed, this Court pertinently observed in *Douglas* that:

> "When society acts to *deprive* one of its members of his *life, liberty* and *property,* it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Douglas* v. *California, supra* at 357. (emphasis supplied)

In *Boddie*, this Court held that the Due Process Clause required that those appellants be afforded access to the Court to obtain a divorce. *Id.* at 122.*

Neither do petitioners advance their argument by claiming that education is a fundamental right which will condition the State's desire to preserve its financial integrity only upon a showing by the state of a compelling state interest. There is a stark difference between, a fundamental constitutional right such as voting (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663) or travel (*Shapiro* v. *Thompson, supra*) and education, which can more accurately be described as one of fundamental importance.

As Mr. Justice STEWART noted in his concurring opinion in *Shapiro* v. *Thompson, supra:*

> "The court today does *not* 'seek out particular human activities, characterize them as "fundamental" and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." Concurring opinion at 642. (Emphasis in text)

This Court observed in *Brown* v. *Bd. of Education*, 347 U.S. 483, 493, that in the field of compulsory education ". . . where the state has undertaken to provide it, it is

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* It is noteworthy that all three decisions in *Griffin, Douglas* and *Boddie* are grounded upon the Due Process Clause, unlike the complaint at bar which seeks relief under the Equal Protection Clause of the Fourteenth Amendment. Moreover, as noted in *Boddie*, the plaintiffs alleged that "welfare income . . . includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce." *Boddie* v. *Connecticut, supra* at 372-373. Welfare payments similarly would not cover defense of criminal prosecutions. Here, the Court of Appeals suggested that the "fixed allowance" petitioners received under New York's Welfare Law "was intended to cover this as well as other contingent needs."

a right which must be made available to all on equal terms." This is in marked contrast to a fundamental constitutional right which is not one for a state to extend or withhold at its pleasure. New York has undertaken, of course, to provide public education, but in testing its response to the needs for education as in the general area of social welfare, the traditional notions of equal protection apply. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78; *McGowan* v. *Maryland*, 366 U.S. 420, 426; *Dandridge* v. *Williams*, 397 U.S. 471, 484; *Jefferson* v. *Hackney*, —— U.S. ——, 32 L. Ed. 2d 285, 296.

In *Jefferson* v. *Hackney*, *supra*, this Court again emphasized, as it had recently in *Dandridge*, that:

> "In 'the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488. So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *Jefferson* v. *Hackney*, *supra* at 296.

Consistent with this approach, in *Briggs* v. *Kerrigan*, 431 F. 2d 967, 969 (1st Cir. 1970), *affg.* 307 F. Supp. 295 (D. Mass. 1969), the Court approved of a Boston practice of giving free lunch only to children in the secondary grades relying upon "the wisdom of the remainder in *Dandridge* [*supra*] that the Fourteenth Amendment does not require the government either to attack a program in its entirety or not at all."

See also *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd. per curiam* 394 U.S. 322, where the District Court pertinently stated that "[t]here is no constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts."

In truth, petitioners' complaint is not with the state statute or the voters of the school district for, as the Court below properly noted, a student's need for textbooks even if determined to be a "basic need" is no more "fundamental than such items as food and clothing which are provided through welfare grants." (72a, footnote 11).*

The State of New York, in empowering local school district voters to assess a tax for textbook purchases (§ 703), under *James* v. *Valtierra*, 402 U.S. 137, clearly did not violate the Equal Protection Clause; nor did its rational legislative determination in mandating purchases of text-

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* Section 131-a of the New York State Social Services Law [McKinney's Consol. Laws, Supp. 1971] abolishes the old system of special grants for specific items of need, replacing them with fixed grants to be determined based on the needs of families in the area which the recipient lives. Petitioners allege that under the old system, grants were made to pay for textbooks. In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), the Supreme Court held this section as originally enacted, to be in violation of 42 U.S.C. § 602(a)(23) which requires that a state in order to receive federal benefits must not lower the standard of need in use in that state on January 1, 1967. Thereafter, the New York Legislature passed the new version of § 131-a now in effect, excluding from the maximums such items as housing, fuel for heating, furniture, and child care services. New York has continued to receive federal funds, and no allegation is made here that § 131-a is still inconsistent with 42 U.S.C. § 602(a)(23). Thus it would appear that the fixed allowance received by petitioners was intended to cover this as well as other contingent needs. This is especially so since the failure to provide books resulted in a similar expense for all children in the School District.

Effective July 1, 1971, § 131-a was amended and New York enacted a ten per cent reduction in the level of benefits. This reduction was upheld by this Court in *Goodwin* v. *Wyman*, —— U.S. —— on the decision in *Jefferson* v. *Hackney*, *supra*.

books for grades seven through twelve, under the doctrine of *Dandridge* v. *Williams, supra,* violate petitioners' rights. Accordingly, the Court below properly determined that petitioners' claims were insubstantial (*California Water Service Co.* v. *City of Redding,* 304 U.S. 252, 255) and that a three-judge court should not be convened.

POINT II

The qualified voters of the Local School District, having voted a tax for the school year 1972-1973, providing free textbooks for the lower grades, the instant action for declaratory relief must fail since there is no actual case or controversy presenting concrete issues.

As noted in Point I, *supra,* petitioners have in effect abandoned their first two causes of action and seek only declaratory relief with respect to New York Education Law § 701, *et seq.*

On May 3, 1972, the qualified voters of the respondent school district elected by majority vote to assess a tax for the purchase of *all* textbooks for grades one through six in the schools of the district. As this Court observed in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of suffi-

cient immediacy and reality to warrant the issuance of a declaratory judgment."

Under the instant circumstances (given the fact that books are being provided for all students and the life expectancy of the books themselves), it is indeed unlikely that there can be a finding of "sufficient immediacy and reality" here. What may happen several years hence, if at all, presents at worst "a hypothetical threat." *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89-90.

As this Court observed in *Golden* v. *Zwickler*, 394 U.S. 103:

> The same is true of the power to pass upon the constitutionality of state statutes. No federal court, whether this Court or a district court, has jurisdiction to pronounce any statute void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. Liverpool, N.Y. & P.S.S. Co. v. Commissioners, 113 U.S. 33, 39 (1885) (emphasis added.)" *Id.* at 110.

Since there is no actual controversy before the Court, and because "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions" (*United Public Workers of America* v. *Mitchell*, *supra* at 89), the complaint should, for this additional reason, be dismissed.

CONCLUSION

The order of the Court of Appeals for the Second Circuit should be affirmed and, for the additional reason that there is no actual and present controversy between the parties, the complaint should be dismissed.

Dated: New York, New York
July 31, 1972

Respectfully submitted,

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Appendix A.

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Albany, New York 12224
Counsel
and
Deputy Commissioner for Legal Affairs

July 21, 1972

Re: Johnson et al. v. New York State Education Dept. et al.

Dear Miss Steel:

This is in answer to your letter of July 17 in the above entitled matter.

I am enclosing, for your information, copy of chapter 699 of the Laws of 1971. The bill was sponsored by this Department, and I am also enclosing a copy of our Memorandum in Support.

Prior to the 1965 and 1966 amendments to the Textbook Law, section 701, subdivision 3 thereof authorized boards of education to purchase textbooks and either rent or sell the same to the students. At that time, also, section 703 made the provision of free textbooks subject to the voters of school districts.

Under this state of the law, the following solution was possible for situations where a budget was defeated and, therefore, no new textbooks could be bought for free use. A school district would have, for instance, a thousand textbooks on hand in a given subject because of purchase during the previous year when the budget was passed by the voters. The following year, an additional 200 students might be in need of books so that 1,200 were needed instead of a thousand. Under such circumstances, said subdivision 3 authorized the board to purchase the additional 200 books and rent all 1,200 books to the students at a rental which would yield the purchase price for the additional 200 books.

When the 1965 and 1966 legislation was enacted, subdivision 3 of section 701 was repealed.

Consequently, it became impossible for a school district, faced with a situation described above to solve the matter in the manner indicated. Consequently, legislation was sponsored by the Department which finally culminated in the enactment of chapter 699 of the Laws of 1971. This restored the possibility referred to above of solving this type of problem which occurred in many instances. Obviously, a board of education cannot pick and choose the students to whom to give free textbooks from existing stocks. This would violate the Equal Protection Clause of both constitutions.

In answer to your specific questions, if a school district has sufficient books on hand in a given school year so that no additional purchases need be made, the books must be loaned free of charge for that year.

If on the other hand, some additional books need be purchased, the total number of books would need to be rented out to the students with the rental computed so as to yield the purchase price for the additional books.

This has been the advice given consistently over the many years to school districts faced with this type of problem.

It should be added that the school district purchase of the additional volumes will result in a saving to individual students because of both the volume discount and the special education discount available for this purpose.

If we can be of any further assistance, please advise.

Sincerely,

ROBERT D. STONE
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